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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. CHARLES WILLIAMS, Defendant and Appellant.	B236012 (Los Angeles County Super. Ct. No. TA116538)

APPEAL from a judgment of the Superior Court of Los Angeles County. Patrick Connolly, Judge. Affirmed as modified.

Randall Conner, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Margaret E. Maxwell, and Tasha G. Timbadia, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * * *

Appellant Charles Williams was convicted by jury of two counts of second degree robbery, one count of attempted second degree robbery, and one count of battery as a lesser included offense of sexual penetration by a foreign object. The jury also found true personal use firearm allegations. The trial court sentenced appellant to a total prison term of 20 years which included a concurrent six-month county jail term for the battery.

Appellant contends that the trial court erred in failing to stay execution of sentence on the battery count pursuant to Penal Code section 654.[1] He argues that the battery conviction was part of the same course of conduct as the robbery. Appellant also contends that the trial court improperly imposed a $20 deoxyribonucleic acid (DNA) penalty. We agree with the claim regarding the financial penalty but reject the contention related to section 654. The judgment, as modified, is affirmed.

BACKGROUND

Procedural Background

In an amended felony information, appellant was charged in count 1 with the attempted second degree robbery (§§ 664, 211) of Tyrone Robinson, in counts 2 and 4 with second degree robbery (§ 211) of K.O. and Carlos Arrivillaga, respectively, and in count 3 with sexual penetration by a foreign object (§ 289, subd. (a)(1)(A)) on K.O. The information specially alleged as to all counts that appellant personally used a firearm within the meaning of section 12022.53, subdivision (b), and that the offenses were committed for the benefit of, at the direction of, and in association with a criminal street gang, with the specific intent to promote, further, or assist in criminal conduct by gang members. (§ 186.22, subd. (b)(1)(C).)

The jury convicted appellant on counts 1, 2, and 4, and found him guilty of battery (§ 242), a lesser included offense on count 3. The firearm enhancements were found true as to counts 2 and 4 only. The gang allegation was found to be not true as to all counts.

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[1] All further statutory references are to the Penal Code unless otherwise stated.

The court selected count 2 as the base term and imposed the high term of five years, plus 10 years for the firearm enhancement, with a consecutive term of one-third the midterm or eight months on count 1, and a consecutive term of one-third the midterm or 12 months, plus 40 months for the firearm enhancement on count 4, for a total prison term of 20 years. On count 3, the court sentenced appellant to serve a concurrent sentence of six months in county jail. The trial court ordered appellant to pay a DNA fee of $20 (Gov. Code, § 76104.7); a $40 court security fee for each count, or $160 (§ 1465.8); a criminal conviction assessment of $30 for each count, or $120 (Gov. Code, § 70373); a restitution fine in the amount of $5,000 (§1202.4, subd. (b)); and a $5,000 parole revocation fine (§1202.45) that was stayed.

Appellant filed a timely notice of appeal.

Prosecution Evidence

On January 29, 2011, Carlos Arrivillaga and Raul Sandoval were working at a recycling center on South Central Avenue in Los Angeles. At approximately 9:00 a.m. a white Toyota Tundra truck with two occupants parked in the driveway. Arrivillaga approached the passenger side of the truck and asked the occupants to move because the truck was blocking the driveway. The truck returned about 10 minutes later. Appellant and the driver, Matthew Stevenson,[2] entered the recycling center. Stevenson asked if Arrivillaga wanted to buy an empty plastic gallon bottle. Appellant drew a gun from his waistband and told Arrivillaga "not to move." Stevenson took a cell phone, a backpack, and cash from the desk inside the recycling center.

Arrivillaga and Sandoval selected appellant's picture from a photographic lineup and also identified him at trial as the individual holding the gun who robbed them.

On January 29, 2011, shortly after 9:00 p.m., Tyrone Robinson and K.O. were leaving a sober living dance on West 97th Street in Los Angeles. They walked outside towards the alley where Robinson had parked. Robinson saw a white pickup truck on

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[2] Stevenson was named as a codefendant in the original information, but the case went to trial solely against appellant.

West 97th Street coming towards them. It pulled up and blocked Robinson's vehicle. Appellant got out from the passenger side, pointed a gun at Robinson and said "Hold up, nigga, don't move." Robinson was scared and ran west towards the corner of Figueroa Street. When he reached the corner he turned around and saw appellant standing in front of K.O. Stevenson had gotten out of the truck from the driver's side. Robinson called 9-1-1 on his cell phone.

Appellant pointed the gun at K.O.'s chest and said "What do you have on you, bitch?" K.O. handed appellant her purse which he threw to Stevenson. Appellant asked K.O. who she "worked" for, and if she had any money. K.O. said she did not have anything on her and "shook out" her bra to show him that she did not have any money hidden there. K.O. was scared that if she did not show appellant she had no money he would search her. She grabbed the front of the stretch pants she was wearing and pulled it open so that appellant could see that she was not hiding anything in her underwear or pants. Appellant inserted two fingers into her vagina and asked her what she had in there. Appellant removed his fingers from K.O.'s vagina but kept his hand in her pants. Appellant inserted and removed his fingers approximately five or six times and then told K.O. "you can go, bitch." Appellant pointed the gun at K.O.'s back as she started to walk away. She turned around and asked "Am I good?" to which Stevenson responded "Go. Go." K.O. saw a police car approach and said "Please, don't shoot me. The police are behind you."

Los Angeles Police Department (LAPD) Officer Derrick Ybarra was driving a marked black and white patrol car south on Figueroa near West 97th Street. He saw a white pickup truck "stopped kind of at a weird angle and people were standing in the street." After circling around the block he observed appellant get into the truck. The truck passed Officer Ybarra's patrol car in the alley. Robinson ran towards Officer Ybarra frantically waving his arms back and forth. Robinson told Officer Ybarra that the men in the truck were armed and had robbed him and K.O. Officer Ybarra sent out a radio broadcast and made a U-turn and pursued the truck. Within a few minutes he heard a radio broadcast of a vehicle accident involving a white pickup truck approximately one

block from where Robinson and K.O. were robbed. On arriving at that location Officer Ybarra saw that the pickup truck had crashed into a PT Cruiser and was on the center median. While inspecting the pickup truck, Officer Ybarra saw a black purse on the passenger side floorboards and five live rounds of ammunition on the ground by the driver's side of the vehicle.

A bystander informed Officer Ybarra that two males ran down a driveway and that "one of the individuals was really fat, heavy." Appellant was arrested while attempting to climb a chain-link fence. He blamed Stevenson and offered to tell Officer Ybarra "everything" as he was being walked back to the accident scene. A loaded gun with 13 rounds of ammunition was found in the street. Robinson and K.O. were transported to the scene and identified appellant as the person who had robbed or attempted to rob them earlier.

LAPD Officer Erik Mejia and his partner Officer Guillen interviewed appellant. Appellant stated that he had known Stevenson for approximately 10 years. He said that earlier in the day he was a passenger in the white pickup truck as Stevenson drove around and shot the gun from inside the truck. They returned to Stevenson's house to reload the gun and then continued to drive around. Stevenson crashed the truck after being chased by the police.

Defense Evidence

Appellant testified on his own behalf. He denied any involvement in the recycling store robbery. He testified that he was a passenger in the car driven by Stevenson during the evening of January 29, 2011. When they saw K.O. they confronted her because she owed both of them money for "some weed." K.O. asked for more time to pay back what she owed and told Stevenson to hold her purse while she made more money. Appellant denied putting his fingers in anyone's vagina that evening. He testified that he and Stevenson got into the truck and Stevenson crashed while attempting to evade the police.

DISCUSSION

I. Stay of Battery Sentence Under Section 654

Appellant contends that the trial court erred when it failed to stay execution of sentence on appellant's conviction for battery because there was not substantial evidence that appellant had an intent or objective other than robbery when he unlawfully touched K.O. Specifically appellant contends that in refusing to stay the battery sentence the trial court "discounted appellant's proven intent and objective to rob K.O., discounted the jury's acquittal of appellant of sexual penetration with a foreign object, and discounted K.O.'s testimony regarding her perception of appellant's intent."

Section 654, subdivision (a) provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other."

In *Neal v. State of California* (1960) 55 Cal.2d 11, 19, our Supreme Court held that section 654 bars punishment under multiple statutory provisions where the defendant engages in an indivisible course of conduct involving a single criminal objective. "The divisibility of a course of conduct depends upon the intent and objective of the defendant. If all the offenses are incidental to one objective, the defendant may be punished for any one of them, but not for more than one. On the other hand, if the evidence discloses that a defendant entertained multiple criminal objectives which were independent of and not merely incidental to each other, the trial court may impose punishment for independent violations committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct. [Citations.] The principal inquiry in each case is whether the defendant's criminal intent and objective were single or multiple." (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1135.)

We apply a substantial evidence standard of review. '"The determination of whether there was more than one objective is a factual determination, which will not be reversed on appeal unless unsupported by the evidence presented at trial.' [Citations.]

'[T]he law gives the trial court broad latitude in making this determination.' [Citation.]" (*People v. Wynn* (2010) 184 Cal.App.4th 1210, 1215.)

In light of the record and what can be rationally deduced, substantial evidence supports the trial court's conclusion that defendant's objective in unlawfully touching K.O. was separate from, and not incidental to, his objective in robbing her.

Appellant's initial intent may have been to rob K.O. but his actions after K.O. relinquished her purse and showed him that she was not concealing any money on her person, exceeded that necessary to commit the robbery. As the court in *People v. Nguyen* (1988) 204 Cal.App.3d 181, 191 observed, "at some point the means to achieve an objective may become so extreme they can no longer be termed 'incidental' and must be considered to express a different and more sinister goal than mere successful commission of the original crime. . . . [¶] . . . [¶] . . . [S]ection [654] cannot, and should not, be stretched to cover gratuitous violence or other criminal acts far beyond those reasonably necessary to accomplish the original offense." Such is the case here. Even if the initial penetration of K.O.'s vagina could be interpreted as a search incident to the objective of robbery, the subsequent penetrations could not, and manifested an objective of sexual gratification.

Although conceding that the jury finding of not guilty of sexual penetration with a foreign object is not dispositive to the substantial evidence issue here, appellant nevertheless argues that it contradicts the evidence and the trial court's findings, and supports their argument. We disagree. Regardless of the jury finding, K.O. unequivocally testified that appellant inserted his fingers in her vagina and removed them on five or six distinct occasions after he had asked K.O. who she "worked for," implying that she was a prostitute. After he withdrew his fingers for the last time, he told K.O. "You can go, bitch."

Appellant argues that K.O. did not perceive the act to be of a sexual nature and therefore it follows that appellant did not have an objective other than robbery. Appellant is mistaken. K.O. described the experience as traumatic, and testified that her "soul was hurt." She testified that the unlawful touching "wasn't consensual" and occurred as

appellant held a gun to her chest. She testified that she did not know appellant and therefore did not perceive the unlawful touching as foreplay or a consensual sexual act. Appellant mistakenly characterizes this testimony as a "clear statement by [K.O.]l regarding appellant's lack of sexual intent." But the testimony was from K.O.'s perspective of the event. The fact that she did not perceive the act to be of a sexual nature had no bearing on appellant's intent.

The trial court's implied finding of appellant's criminal intent and his objective of sexually assaulting K.O. while she was under his control, independent of his intent to rob her, is amply supported by the evidence presented at trial. (*People v. Osband* (1996) 13 Cal.4th 622, 730–731.)

II. DNA Collection Fee

Appellant contends the sentencing minute order and abstract of judgment erroneously reflect the imposition of a $20 DNA collection fee. He argues that the trial court had no authority to impose the collection fee because under Government Code section 76104.7, the fee is calculated as a percentage of qualifying fines, and none of the other fines imposed by the trial court qualifies as a basis for imposing the DNA fee. The People agree and so do we.

The sentencing minute order and abstract of judgment state that appellant must pay a $20 DNA collection fee pursuant to Government Code section 76104.7. No DNA collection fee is authorized under Government Code section 76104.7 unless other types of fess or fines are imposed upon the defendant. (Gov. Code, § 76104.7, subd. (a).) The only other fees and fines imposed upon appellant were a $5,000 restitution fine (§1202.4, subd. (b)), a $5,000 parole revocation fine (§1202.45), a $160 court security assessment (§ 1465.8), and a $120 criminal conviction assessment (Gov. Code, § 70373). None of these supports a DNA collection fee. (Gov. Code, § 76104.7, subd. (c)(1) [restitution fines]; *People v. Valencia* (2008) 166 Cal.App.4th 1392, 1396 [court security assessment]; Gov. Code, § 70373, subd. (b) [criminal conviction assessment].)

Accordingly, the sentencing minute order and abstract of judgment must be amended to correct this error.

DISPOSITION

The judgment is modified to strike the order requiring appellant to pay a $20 DNA collection fee pursuant to Government Code section 76104.7. The superior court is directed to prepare an amended sentencing minute order and prepare and forward to the Department of Corrections and Rehabilitation an amended abstract of judgment reflecting this modification. The judgment is affirmed in all other respects.

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_____, J.

DOI TODD

We concur:

_____, P. J.

BOREN

_____, J.

ASHMANN-GERST